

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DERICK JEROME LEWIS,

Plaintiff,

v.

AT&T, INC., et al.,

Defendants.

No. 2:20-cv-461-KJM-EFB PS

ORDER AND FINDINGS AND
RECOMMENDATIONS

The court previously granted plaintiff's application to proceed *in forma pauperis*, but dismissed his complaint for failure to state a claim pursuant to 28 U.S.C. § 1915(e)(2). ECF No. 3. Plaintiff was granted leave to file an amended complaint. He has since filed a first amended complaint (ECF No. 4), as well as another application to proceed *in forma pauperis* (ECF No. 5). Because plaintiff has already been authorized to proceed *in forma pauperis*, his recently filed application is denied as unnecessary. Further, it is recommended plaintiff's first amended complaint be dismissed without further leave to amend, for the reasons set forth below.

As previously explained to plaintiff, although pro se pleadings are liberally construed, *see Haines v. Kerner*, 404 U.S. 519, 520-21 (1972), a complaint, or portion thereof, should be dismissed for failure to state a claim if it fails to set forth "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562-563, 570 (2007) (citing *Conley v. Gibson*, 355 U.S. 41 (1957)); *see also* Fed. R. Civ. P. 12(b)(6). "[A] plaintiff's

1 obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and
2 conclusions, and a formulaic recitation of a cause of action’s elements will not do. Factual
3 allegations must be enough to raise a right to relief above the speculative level on the assumption
4 that all of the complaint’s allegations are true.” *Id.* at 555 (citations omitted). Dismissal is
5 appropriate based either on the lack of cognizable legal theories or the lack of pleading sufficient
6 facts to support cognizable legal theories. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699
7 (9th Cir. 1990).

8 Under this standard, the court must accept as true the allegations of the complaint in
9 question, *Hospital Bldg. Co. v. Rex Hosp. Trustees*, 425 U.S. 738, 740 (1976), construe the
10 pleading in the light most favorable to the plaintiff, and resolve all doubts in the plaintiff’s favor,
11 *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). A pro se plaintiff must satisfy the pleading
12 requirements of Rule 8(a) of the Federal Rules of Civil Procedure. Rule 8(a)(2) requires a
13 complaint to include “a short and plain statement of the claim showing that the pleader is entitled
14 to relief, in order to give the defendant fair notice of what the claim is and the grounds upon
15 which it rests.” *Twombly*, 550 U.S. at 555 (citing *Conley*, 355 U.S. at 47).

16 Like the prior complaint, the first amended complaint is largely unintelligible. It purports
17 to allege claims for violation of plaintiff’s Fifth and Fourteenth Amendment rights under 42
18 U.S.C. § 1983 against two individuals—Kyle Buege and Ilena Poole—and several
19 telecommunication companies and government agencies, including AT&T, the Sacramento
20 County Superior Court, and the United States Department of Justice, to name a few. ECF No. 4.
21 Liberally construed, the amended complaint alleges defendants hacked plaintiff’s wireless phone,
22 accessed his personal data, and then posted his personal text messages, emails, videos, photos,
23 and audio recordings online. *Id.* at 5-6. It also includes vague allegations concerning plaintiff’s
24 two arrests in 2020; the first for robbery and the second allegedly due to plaintiff making
25 complaints that someone illegally accessed his EBT account. *Id.* at 7. The amended complaint
26 also alleged plaintiff’s rights were violated by “gang stocking [sic]” activities, which included
27 tracking plaintiff’s phone and intercepting his calls. *Id.* at 8.

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1 These vague and fanciful allegations fail to state a claim upon which relief may be
2 granted. Although the Federal Rules adopt a flexible pleading policy, a complaint must give fair
3 notice and state the elements of the claim plainly and succinctly. *Jones v. Community Redev.*
4 *Agency*, 733 F.2d 646, 649 (9th Cir. 1984). Plaintiff must allege with at least some degree of
5 particularity overt acts which defendants engaged in that support plaintiff's claim. *Id.* The
6 allegations must be short and plain, simple and direct and describe the relief plaintiff seeks. Fed.
7 R. Civ. P. 8(a); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002); *Galbraith v. County of*
8 *Santa Clara*, 307 F.3d 1119, 1125 (9th Cir. 2002). Not only does plaintiff fail to identify the
9 specific constitutional provision defendants allegedly violated, his allegations fail to apprise
10 defendants of the factual basis for his claims.

11 Accordingly, plaintiff's complaint must be dismissed for failure to state a claim. Further,
12 the court finds that granting further leave to amend would be futile. Plaintiff has already been
13 afforded an opportunity to amend, and his allegations continue to fall far short of stating a
14 cognizable claim. Consequently, it is recommended that the dismissal be without further leave to
15 amend. *See Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987) (while the court ordinarily
16 would permit a pro se plaintiff to amend, leave to amend should not be granted where it appears
17 amendment would be futile).

18 Accordingly, it is hereby ORDERED that plaintiff's request for leave to proceed *in forma*
19 *pauperis* (ECF No. 5) is denied as unnecessary.

20 Further, it is RECOMMENDED plaintiff's first amended complaint be dismissed without
21 leave to amend and the Clerk be directed to close the case.


22 These findings and recommendations are submitted to the United States District Judge
23 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
24 after being served with these findings and recommendations, any party may file written
25 objections with the court and serve a copy on all parties. Such a document should be captioned
26 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections

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1 within the specified time may waive the right to appeal the District Court's order. *Turner v.*
2 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: September 25, 2020.

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5 EDMUND F. BRENNAN
6 UNITED STATES MAGISTRATE JUDGE
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